

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

EAGLE 5 ENTERPRISES INC. dba
SPACEBUDS THE DISPENSARY,

Case No. 19-RC-288429

Employer,

and

UNITED FOOD AND COMMERCIAL
WORKERS LOCAL 555,

Petitioner.

**EMPLOYER’S OBJECTIONS TO CONDUCT
AFFECTING THE RESULTS OF THE ELECTION**

The Employer, Eagle 5 Enterprises Inc. dba Spacebuds the Dispensary (“Spacebuds”), hereby files an objection to the conduct of the election affecting the results of the election pursuant to 29 C.F.R. § 102.69. Spacebuds will simultaneously submit evidence to the Board in support of these Objections as required by 29 C.F.R. § 102.69. This is a voter disenfranchisement case. A potentially determinative number of employees were denied the opportunity to have their vote counted due to election irregularities caused by the Region. The election should be set aside because the disenfranchised employees are sufficient in number to affect the election.

FACTS

The ballot count in this election was counted as four votes in favor of the petitioner, three against, and two ballots are currently challenged. This is only nine ballots out of fourteen individuals who were on the voter list. Given the two current challenges, it is possible that just one ballot would be determinative. In what could be an election decided by a single vote, at least one employee was denied an opportunity for (b) (6), (b) (7)(C) vote to count, not by lack of desire or diligence on (b) (6), (b) (7)(C) part, but because of a critical failure in the election process. The Board’s normal mail-balloting

procedures suffered an unacceptable breakdown despite at least one employee's attempted exercise of (b) (6), (b) (7)(C) rights under the Act to have a say in (b) (6), (b) (7)(C) representation.

The parties agreed to a mail ballot election by Stipulated Election Agreement. One employee in the eligible voter list voluntarily told the Employer about a situation (b) (6), (b) (7)(C) experienced in trying to have (b) (6), (b) (7)(C) vote counted. Specifically, that employee left (b) (6), (b) (7)(C) ballot in (b) (6), (b) (7)(C) mailbox to be picked up. It was not picked up there. The Notice of Election document sent to voters did not provide any guidance on how to handle such a situation. When it was not picked up, and six days before ballots were due back to the Region, the employee took the ballot to the post office to see why the mail had not been picked up. At the post office, someone told the employee that the pre-paid ballot return envelope from the Region was five cents short of the required amount of postage. The employee believed that the post office then sent the ballot out for (b) (6), (b) (7)(C) however, inexplicably, the Region did not receive this employee's ballot and (b) (6), (b) (7)(C) vote was not counted. Through voluntary disclosures to the Employer, there is also reason to believe that other ballots were cast in this election that somehow were not included in the count.

Despite (b) (6), (b) (7)(C) efforts, and through no fault of (b) (6), (b) (7)(C) own, at least this employee, and possibly others, was disenfranchised because of a clear irregularity in the Board's procedures for mail ballot elections. The Board's procedures for conducting a mail ballot election require properly metered postage, so voters do not have to pay for postage. The ballot kits sent to eligible voters are supposed to include a postage-paid return envelope addressed to the Regional Office. The NLRB's Case Handling Manual defines the procedures for conducting mail ballot elections. As relevant here, Section 11336.2(c) provides that "Pursuant to Postal Service regulations, the yellow return envelopes should be stamped by the Regional Office postage meter, with the date left blank." Section 11336.2(c) also instructs that kits mailed to each voter contain "Instructions to Eligible

Employees Voting by United States Mail (Form NLRB 4175), which expressly states “No Postage is Necessary.” In a mail ballot election, the postal system acts as the Region’s conduit for facilitating receipt of the ballots. Here, there is no question that an irregularity occurred in the Board’s clearly defined mail election procedures—this employee’s ballot was not picked up due to insufficient postage and then (b) (6), (b) (7)(C) had to go to the post office to resolve this issue where (b) (6), (b) (7)(C) was told the postage on (b) (6), (b) (7)(C) envelope was insufficient. The Region has also represented that there were no late ballots received in this election, so there is no legitimate explanation for how the Region did not receive this ballot. A series of failures in the mail ballot election process have resulted in an eligible voter being denied the opportunity to vote and have a say in (b) (6), (b) (7)(C) representation.

OBJECTION

The Board’s precedent requires that an election be set aside when the actions of a party or the Board cause a determinative number of employees to lose the opportunity to vote through no fault of their own. The Board’s law is clear—although employees have some responsibility for overcoming obstacles to voting, if the Board itself causes an “irregularity” and the number of voters possibly disenfranchised could affect the outcome of an election, no certification of the result is appropriate. *Nat’l Hot Rod Ass’n v. NLRB*, 988 F.3d 506, 508-09 (2021) (citing *Garda World Security Corp.*, 356 NLRB 594 (2011); *Waste Mgmt. of Nw. La., Inc.*, 326 NLRB 1389 (1998); *Visiting Nurses Ass’n of Metro. Atlanta, Inc.*, 314 NLRB 404 (1994)). This standard is strict: The Board has overturned election results even when Board agents inadvertently closed a polling location for five minutes, *Wolverine Dispatch, Inc.*, 321 NLRB 796, 796-797 (1996), or even one minute early, *Garda*, 356 NLRB at 594. This standard does not even require that the challenger show that any specific voter was disenfranchised. *Id.*; *See also Davis & Newcomer Elevator Co.*, 315 NLRB 715 (1994) (applying a similar standard to mail-in elections).

The Board is committed to ensuring that employees have the opportunity to vote and participate in the election process. Under the Board's established precedent, it will set aside an election based on voter disenfranchisement when there is an irregularity in the election mechanics that is attributable to either the Board or a party and that results in a determinative number of voters possibly being disenfranchised. For example, in *Davis & Newcomer Elevator Co.*, 315 NLRB 715 (1994), where the union won by a single vote, the Board set aside an election because the regional office failed to send a duplicate ballot kit to a voter whose return ballot arrived in two separate pieces, apparently in different envelopes. In the Board's view, this was not a "minor deviation," and was sufficient to set aside the election. In another case, *North American Aviation, Inc.*, 81 NLRB 1046, 1048-1049 (1949), the Board ordered a new election based on "a chain of events" that may have precluded a substantial number of employees from being able to express their desires. These irregularities included, among others, voters not receiving their mail ballots in a timely fashion and being unable to contact the regional office by telephone because of continuous busy signals.

In *Star Baking Co.*, 119 NLRB 835 (1957), which involved a mixed manual-mail ballot election, the Board set aside an election where an equal number of votes were cast for and against union representation because, through inadvertence, an employee who was scheduled to vote by mail was not sent a mail ballot. The employee resided about 45 miles from the polling place, and it was not feasible for him to travel to this site. The Board noted:

[I]t is the responsibility of the Board to establish the proper procedure for the conduct of its elections, which procedure requires that all eligible voters, not merely a representative number, be given the opportunity to vote. It is particularly important to remedy the failure to discharge this responsibility where, as here, the vote of the employee who failed to receive a ballot could have affected the results of the election.

Id. at 835.

The Employer recognizes that the Board has found slow delivery of mail ballots and mail ballots lost in the mail do not necessarily warrant setting aside an election. However, this is not just a matter of a late ballot or lost mail. Rather, this is a case where at least one possibly dispositive voter did not have opportunity to vote through no fault of (b) (6), (b) (7)(C) own because of a breakdown in the Board's election mechanics. This situation is more akin to a case where an eligible voter shows up to an election, only to find there is no ballot box to cast her vote. *See, e.g., Wolverine Dispatch, Inc.*, 321 NLRB 796 (1996) (ordering a new election where no Board agent or ballot box was present at the polling place during part of the election period); *see also NLRB v. Pinkerton's, Inc.*, 621 F.2d 1322 (6th Cir. 1980) (evidentiary hearing was appropriate to determine whether the NLRB actually sent ballots to all employees because the petitioner had established an unusual pattern of nondelivery that made the court "particularly skeptical of the regularity of the Board's procedures.").

A clear irregularity occurred in the Board's established election mechanics. The Board's procedures for conducting mail ballot elections requires that voters receive pre-paid envelopes to mail in their ballot. Voters are specifically instructed that **no postage is necessary** to mail their ballot. Nevertheless, this voter was told that the Region's envelope had insufficient postage. This is precisely the type of irregularity that warrants setting aside an election. It is not clear what exactly caused this breakdown in the Board's election procedures, but the Employer has met its burden. Indeed, this employee was *actually* disenfranchised, as (b) (6), (b) (7)(C) vote was not counted.

This employee's vote may be determinative and the Board is required by its own precedent to set aside the election. At least one employee was disenfranchised and denied a reasonable opportunity to participate in the election process and exercise employees' right to "choose freely their representatives." Worse, this was not at all due to inaction on the voter's part, but because of

clear irregularities in the election mechanics. Given the current ballot tally and challenged ballots, if even one employee was disenfranchised through these irregularities, the outcome of the election is cast in doubt, and the Employer's objection must be sustained. Failure to order the election rerun amounts to voter disenfranchisement. Further, in light of the issues and now distrust in the mail ballot process, the Employer requests that the rerun be ordered as a manual election. The Employer is prepared to meet all current requirements from the Board and Region for manual elections. The Employer respectfully requests that the election be set aside and a new election ordered.

DATED this 17th day of March, 2022.

Respectfully submitted,

BARRAN LIEBMAN LLP

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CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of March, 2022, I served the foregoing EMPLOYER'S OBJECTIONS TO CONDUCT AFFECTING THE RESULTS OF THE ELECTION via electronic filing through the National Labor Relations Board's website, www.nlr.gov, upon the following:

Ronald Hooks
Regional Director
National Labor Relations Board, Region 19
915 Second Avenue, Room 2948
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Copies were also served via electronic mail on the following:

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By s/Nicole C. Elgin

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